STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

08-E-0053

In the Matter of the Liquidation of Noble Trust Co.

MEMORANDUM OF LAW OF THE LIQUIDATOR IN OPPOSITION TO STANLEY MILLER MOTION FOR TEMPORARY INJUNCTIVE RELIEF

Peter C. Hildreth, Banking Commissioner for the State of New Hampshire (the "Commissioner"), as duly appointed Liquidator for Noble Trust Company (the "Liquidator" and "NTC," respectively), by and through his attorneys, the Office of the Attorney General and Sheehan Phinney Bass + Green, Professional Association, hereby objects to the Verified Motion of Stanley D. Miller to Intervene and For Modification of the Order Appointing Liquidator and Other Temporary and Permanent Injunctive Relief (the "Miller Motion"), with particular emphasis on the Miller Motion's request for injunctive relief. The Liquidator objects because the movant, Stanley D. Miller ("Miller") is not entitled to the relief he requests, and because there is already in place an order of this Court providing all the protection to which Miller is legitimately entitled. In support hereof, the Liquidator respectfully represents as follows:

Summary of the Issues

Miller moves the Court to enjoin the Liquidator from taking any action with respect to certain life insurance policies in which Miller claims an interest (the "Policies"), including "continuation or consummation of any negotiations with insurers" that had issued the Policies. While the Liquidator vigorously disputes that Miller has any protectable interest in the Policies, the ready answer for purposes of the injunctive relief sought is that the

Liquidator's acts are already subject to the supervision and orders of this Court under the statute and the orders appointing him. Since Miller will have an opportunity to be heard by this Court prior to the Liquidator's taking actions that affect his claimed interest in the Policies, Miller will suffer no irreparable harm at the hands of the Liquidator, now, or at any time during the liquidation. If that is not enough, Miller has not alleged that he lacks an adequate remedy at law (which indeed he has). Miller also lacks clean hands and is thus not entitled to equitable relief.

At its most basic, Miller's claim is that he is a trustee of certain trusts that were formed by Noble Trust Company and that own beneficial interests in certain life insurance policies. Those policies, claims Miller, were pledged by Miller and Noble Trust to obtain premium financing. In transferring rights for the purpose of the refinancing, Miller claims, Noble Trust lost rights to control the disposition of the policies or to claim the benefit from those policies in any way.

As the Court is no doubt aware, it entered an Order Appointing Liquidator on March 31, 2008, which was subsequently clarified by Order entered June 11, 2008. Among the terms of those orders are provisions that protect all of the insurance policies at issue in this case and makes the administration thereof subject to further order of the Court. While the Liquidator is authorized to deal in Noble Trust's assets in the ordinary course, that authorization does not extend to out of the ordinary course settlements and other dispositions of property. Moreover, the insurers who issued the policies in question are enjoined by the Order from canceling or rescinding any of the policies, or even allowing the policies to lapse.

Given the significant procedural and substantive protections already in place, Miller's claims of threatened irreparable harm are baffling. As a trustee, his fiduciary obligations run

only to the beneficiaries of the trusts in which he was appointed. As more fully discussed below, the beneficiaries of those trusts are other trusts of which Noble Trust is the trustee. Noble Trust's interests in those trusts are property of this liquidation estate, and are protected by the Liquidator and this Court's orders. The injunctive relief that Miller seeks does not protect those interests; it threatens them.

The Liquidator has reached a settlement with PHL Variable Insurance Co. ("Phoenix") with respect to certain insurance policies issued by Phoenix and simultaneously with this memorandum, moves the Court to approve that settlement. The Liquidator incorporates the Phoenix settlement motion herein by reference, not for the purposes of having this Court adjudicate it as part of its adjudication of Miller's motion, but to illustrate the point that Miller's claimed interests in the Policies are adequately protected by procedures already in place. To the extent that he objects to the approval of the Phoenix settlement, he will have ample opportunity to raise his objections in connection with the hearing thereon. It is noteworthy that but for the settlement, Phoenix would in all probability attempt to rescind each of the policies that the settlement resolves and return nothing to the life insurance trustees, trust beneficiaries or premium financers, because Phoenix's claim for costs and return of commissions exceeds the amount of premiums that it received by over $1.1 million. If Phoenix were to succeed in doing so, Miller and those to whom he owes a fiduciary duty would stand little or no chance of any recovery on the three policies in which he claims an interest and that are included in the Liquidator's $1.5 million settlement.

Factual Background

1. By order entered March 31, 2008, this Court appointed the Liquidator to take possession of and liquidate for the benefit of creditors all of the assets of Noble Trust. Noble

Trust is a non-depositary trust company, which served as trustee of a number of irrevocable life insurance trusts. It variously served as trustee or co-trustee of the trusts.

2. The Liquidator initiated this proceeding because the Banking Department discovered that Colin P. Lindsey (Noble Trust's president and chairman) ("Lindsey") and others appeared to be operating Noble Trust in an unsafe and unsound manner, including the commission of frauds upon the company's clients.

3. Among Noble Trust's assets that the Liquidator has encountered in his marshalling effort are a number of life insurance policies.

4. The insurance policies (including the Policies in which Miller claims an interest) may have significant value to this liquidation proceeding. In addition, the Policies, or some number of them, may properly be included in this liquidation proceeding because they may have been used by certain of Noble Trust's former officers and directors in the perpetration of frauds. The Liquidator's investigation into these complex matters is thorough and ongoing, and he is cooperating in parallel civil and criminal investigations conducted by state and federal authorities.

5. Pending the conclusion of his investigation into Noble Trust's assets and operations, one of the Liquidator's primary objectives has been to maintain the status quo with respect to all of the policies and the parties claiming an interest therein, accomplished in part by this Court's orders protecting the Policies from seizure, cancellation or lapse.

6. Miller's motion is coincidental to, and perhaps inspired by, the previously mentioned negotiated settlement agreement that the Liquidator reached with Phoenix involving nine insurance policies issued by Phoenix upon false pretenses. The Liquidator has filed a Motion for Approval of Settlement (the "Phoenix Settlement Motion")

contemporaneously with this Memorandum, and is separately requesting a hearing on the Phoenix Settlement Motion on notice to all parties known to be claiming an interest in the policies that it would affect.

7. The Liquidator is holding Phoenix's $1.5 million settlement payment, subject to approval of the Phoenix Settlement Motion by this Court. The $1.5 million exceeds the approximately $1 million in premiums that Miller claims were paid in connection with the Policies, and represents approximately one-half of all of the premiums paid on the nine Phoenix policies to which the Phoenix Settlement Motion relates. The Liquidator is confident that the Phoenix Agreement is fair, equitable and prudent, and will bring significant value into the liquidation that would otherwise not be available for distribution to claimants.

8. By his Motion, Miller seeks to enjoin the Liquidator from administering (and thereby remove from the protection of this liquidation proceeding) the Harry Baker, Coull, Gorham, Robinson, Betty Ryan, Roy Ryan and Trasente policies, apparently so that he can service or satisfy the debts incurred during the premium refinancing that occurred when the Miller sub-trusts were formed. *See* Miller Motion at ¶¶ 7-8; infra part IIA. However, the Liquidator has evidence that at least three of the Policies were procured by fraud. Two of them (relating to Messrs. Trasente and Gorham) are more fully discussed in the Phoenix Settlement Motion. The third was issued by an insurer other than Phoenix on the life of Harry Baker, who is the subject of Miller's Exhibits B and C, discussed more fully below.

9. With respect to the remaining Policies in the Miller group, there is some evidence that suggests that those Policies may also be have been a part of a fraudulent scheme. The Liquidator is continuing to investigate these and other matters relating to the Policies. In the

interim, as a matter of equity, the value of those Policies should be preserved for the benefit of all the claimants against Noble Trust, not just Miller.

10. Both Miller and the premium financer on the Policies, Aqua Blue, have filed proofs of claim in this liquidation proceeding with respect to the Policies and the premium financing associated with them.[1]

Argument

I. Miller's Intervention Should Be Denied Because the Liquidator Represents the Interests of Claimants Like Miller

The Liquidator does not dispute that Miller should have the right to appear and be heard on matters affecting the Policies. Miller's request for full intervention should be denied, however, because, as a claimant against Noble Trust, his interests as trustee are adequately represented by the Liquidator. *See United Nuclear Corp. v. Cannon*, 696 F.2d 141, 144 (1st Cir. 1982) ("prospective intervenor faces a presumption of adequacy when it has the same ultimate goal as a party"); *Moosehead Sanitary Dist. v. S.G. Philips Corp.*, 610 F.2d 49, 54 (1st Cir. 1979) (when parties have same interest courts apply "presumption of adequate representation" and deny intervention).

Miller has already filed claims in the proceeding yet nevertheless seeks to intervene to protect his alleged monetary interests in the policies. That goal is shared by the Liquidator appointed by this Court pursuant to a statutory scheme designed specifically to protect and maximize the rights of claimants who did business with the failed bank. Under RSA 395, the Liquidator has the power and the duty to collect Noble Trust's assets, reduce them to cash,

[1] Miller filed proofs of claim nos. 187 through 193 for ownership interests claiming first priority. Aqua Blue filed claims nos. 206 through 212 for principal and interest on premium finance loans. In addition, both Roy and Betty Ryan have filed proofs of claim with respect to their life insurance trust interests.

and then review claims and where appropriate, pay dividends to creditors. The statutory scheme provides more than adequate representation of the financial interests of Miller in the value of the policies.

The Liquidation is a statutory *in rem* proceeding. *See Lion Bonding & Surety Co. v. Karatz*, 262 U.S. 77, 88-92 (1923). Presently, the parties of record in this proceeding are the Liquidator, Noble Trust, Lindsey, and the New Hampshire Insurance Department (which sought and received permission to intervene). In an *in rem* proceeding such as this, it would be unmanageable to afford party status to anyone who, like Miller, asserts a claim against the entity being liquidated. There are over two hundred proofs of claims filed with the Liquidator, including those filed by Miller, Aqua Blue and the Bakers. *See Ainsworth v. Old Security Life Ins. Co.*, 685 S.W.2d 583, 585-86 (Mo. App. 1985) (statutory receivership is not an "action" to which litigation rules such as intervention applies). Similarly, it makes no sense for Miller to conduct his own liquidation of the policies and their value so that he can satisfy the claims of Noble Trust clients with claims and other parties that have filed claims with Noble Trust. Instead, in the interests of economy and non-interference in the liquidation process, intervenor status should not be generally afforded to all claimants, Miller being one of many.

Notwithstanding Miller's lack of standing to intervene in the liquidation generally, the Liquidator does not dispute that Miller has a right to be heard to assert his interests in the Policies when those in which he claims a specific and direct interest may be affected by some action of the court. To that end, if the court wishes to allow Miller to appear through counsel and be heard with respect to the policies he claims are in the Miller Sub-Trusts, and not to intervene for all purposes in the liquidation, the Liquidator has no objection.

II. Miller Cannot Meet The Standards For Injunctive Relief

"The issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy." *New Hampshire Dep't of Envtl Servs. v. Mottolo*, 155 N.H. 57, 63 (2007). "An injunction should not issue unless there is an immediate danger of irreparable harm to the party seeking injunctive relief, ... there is no adequate remedy at law ... [and the] party seeking an injunction [is] likely [to] succeed on the merits." *Id.* The trial court retains the discretion to decide whether "to grant an injunction after consideration of the facts and established principles of equity." *Id.* "The injunction is an extraordinary remedy which is only granted under circumstances where a plaintiff has no adequate remedy at law and is likely to suffer irreparable harm unless the conduct of the defendant is enjoined." *Timberlane Regional School Dist. v. Timberlane Regional Educ. Assoc.*, 114 N.H. 245, 250 (1974). The equitable powers of the court should only be exercised "if the petitioner has no other means of protecting itself . . .." Weibusch, Civil Practice & Proc. § 19.08. Miller bears the burden of showing that he has standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

A. Miller Is Not Likely To Succeed On The Merits

His allegations notwithstanding, Miller is unable to demonstrate a likelihood of success on the merits of his claim that the sub-trusts of which he is trustee hold an ownership interest in any of the policies and thus provide the basis of his claim for the need of equitable protection. Miller alleges that he is "General Trustee" of a series of sub-trusts formed specifically as vehicles to engage in the refinancing of life insurance premium finance loans that Noble Trust had previously entered into. He further claims that Noble Trust transferred "all right, title and interest in and to the Policies to the Sub-Trusts;" that "legal title to the

Policies now rests in the Sub-Trusts;" and that the Liquidator is "estopped from claiming any ownership interest in the Policies." Miller Motion at ¶ 9. Based upon the Liquidator's own review of Noble Trust's books and records, however, and the exhibits attached to Miller's Petition, Miller's allegations are simply wrong.

Miller attaches two trust documents relating to Harry O. Baker —a Noble Trust client— as representative of the nature of Miller's alleged interest in the Policies. The first, Miller Exhibit B, is "The Harry O [sic] Baker Irrevocable Trust" (which Miller refers to as the "Master Trust"), of which Noble Trust is trustee. Article VIII, Paragraph S (at page 14) of the Master Trust permits the creation of subtrusts, described as "*equivalent to a separate trust, including trusts with their own separate tax identity.*" (Emphasis added).

The Master Trust authorizes creation of a subtrust "in order to permit [trust property] to achieve some tax, investment or other benefit that would otherwise not be available" if the particular property in question was held in the Master Trust itself. Presumably for that purpose, the Master Trust (of which Noble Trust is trustee) created the "Harry O Baker Irrevocable Sub Trust" [*sic*] (Miller Exhibit C) (the "Miller Subtrust"), of which Miller is "General Trustee." According to Section 1.07 of the Miller Subtrust, the Master Trust is the sole beneficiary of the Subtrust. Consistent with the enabling language of Article VIII, Paragraph S of the Master Trust, the Miller Subtrust has its own federal tax ID number: 26-0411090.

The Miller Subtrust, however, is not, and has never been, the owner of the policy that Miller claims that it owns.

According to Noble Trust's books and records, the policy in question is policy No. 8192490, issued by Penn Mutual Life Insurance Company on May 11, 2007 in the face

amount of $14 million (the "Baker Policy"). Penn Mutual issued the Baker Policy pursuant to an application for insurance dated January 10, 2007 (the "Penn Application").[2]

The Penn Application identifies both the intended owner and the beneficiary of the Baker Policy, but neither of them is the Miller Subtrust, either in name or in federal tax ID number. The owner and the primary beneficiary identified in Sections H and K, respectively, is a trust using the year "2007" in its naming convention, described alternately as the "2007 Harry Baker Irrevocable Trust" and the "2007 Harry O Baker, Sr. Irrevocable Trust" (the "2007 Subtrust"). The Penn Application identifies the 2007 Subtrust as holding the federal tax ID number 20-7220496—not 26-0411090. Pursuant to the express terms of both the Penn Application and, when it issued, the Baker Policy itself, the Baker Policy became the property of the 2007 Subtrust, not the Miller Subtrust. Miller is not a trustee under the 2007 Subtrust; Noble Trust is. Thus, when Miller later purported to assign or hypothecate the Baker Policy as general trustee of the Miller Subtrust, the Miller Subtrust had no interest in the Baker Policy to assign or hypothecate.

Miller chose the Baker Policy and the Baker trust documents as representative of his standing and his interest in the Policies. However, as demonstrated above, Miller cannot meet his burden of proving that he has any interest in the Baker Policy, let alone an interest that would be at all protected by his proposed injunctive relief. *See Lujan*, 504 U.S. at 561. In fact, the opposite is true. Moreover, even if Miller or his subtrusts had a cognizable interest in any of the Policies, that interest is better protected by the existing Orders Appointing Liquidator and is adequately represented by the Liquidator. Where Miller has

[2]The Penn Application states on its face that the amount of insurance applied for was $10 million, not $14 million.

the burden of proof and chose to attempt it with the Baker Policy and documents as his evidence, his failure on that evidence is fatal to his establishment of standing and of showing a likelihood of success on the merits. *See Lujan v. National Wildlife Fed.*, 497 U.S. 871, 897 (1990) ("a litigant's failure to buttress its position because of confidence in the strength of that position is always indulged in at the litigant's own risk.").

B. Miller Cannot Demonstrate Any Irreparable Harm

Miller argues that he will suffer irreparable harm "due to the misappropriation of the Policies or the proceeds thereof for the benefit of NTC's creditors...." Miller Motion at ¶ 21. The Order Appointing the Liquidator and the statutory scheme provide protection for Miller's purported interests more than adequately. The Liquidator is granted certain powers and assigned certain duties by the Order Appointing the Liquidator and the statute. The Liquidator cannot take action with respect to Noble Trust's property out of the ordinary course of Noble Trust's business. Other parties, such as the insurers under the Policies, are prohibited by the Order from taking any action with respect to the Policies such as rescinding or terminating them. The relief that is sought by Miller's Motion evidences his recognition that the Order Appointing Liquidator provides effective protection. *See* Miller Motion at part III (seeking "relief from the Liquidation Order"). The Liquidator cannot and will not take any actions with respect to the Policies without court approval and notice to all interested parties. As a result, Miller's interests are protected and there is no risk of any harm to Miller, irreparable or otherwise, now or in the future.

C. Miller Has Not Alleged That He Lacks An Adequate Remedy At Law.

Miller has not even attempted to argue that he lacks an adequate remedy at law. The problem, of course, is that he clearly does have an adequate remedy at law of which he has already taken advantage. Under the liquidation law, Miller was entitled to file proofs of claim for each sub-trust and policy. *See* RSA 395:13. Miller filed proofs of claim. Filing a proof of claim in the liquidation proceeding, however, is an election by Miller to proceed within the adequacy of his legal remedy. *See, e.g., Gardner v. New Jersey*, 329 U.S. 565, 573 (1947) ("it is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide by the consequences of that procedure."); *Arecibo Community Health Care, Inc. v. Puerto Rico*, 270 F.3d 17, 25 (1st Cir. 2001) (affirming *Gardner* principles.); *see also Langenkamp v. Culp*, 498 U.S. 42, 44-45 (1991) (party submitting proof of claim in bankruptcy submits to jurisdiction of court and waives right to jury trial); *Katchen v. Landy*, 382 U.S. 323 (1966) (creditor submitting proof of claim waives right to plenary proceeding on related preference recovery action and is bound by summary proceedings in liquidation); *Tucker Plastics, Inc. v. Pay 'n Pack Stores, Inc. (In re PNP Holdings Corp.)*, 99 F.3d 910, 911 (9th Cir. 1996) (creditor filing a proof of claim assents to personal jurisdiction). The filing of claims in this case evidences that Miller has an adequate remedy at law, has elected that remedy, and is consequently, not in need of and not entitled to equitable relief. This liquidation process is Miller's adequate remedy at law (and that of the many other claimants as well).

D. Miller Is Not Entitled To Equitable Relief Because He Does Not Have Clean Hands

"Equitable relief will be denied if one comes to the court with unclean hands." *Noddin v. Noddin*, 123 N.H. 73, 76 (1983). Miller claims to represent the interests of the owners of seven policies. The Liquidator has evidence that certain of these policies were obtained from the insurers by fraud. The frauds include lying about net worth and financial inducements made by Balcarres or Lindsey to the insured to obtain the respective policies. If granted, Miller's requested injunction would have the effect of continuing those frauds through his motion and petition. Clearly this is not an appropriate use of the court's equitable powers.

WHEREFORE, the Liquidator prays that this Court enter an order denying the request for injunctive relief, and granting him such other and further relief as may be just.

Respectfully submitted,

Dated: December 17, 2008

PETER C. HILDRETH, BANKING COMMISSIONER OF THE STATE OF NEW HAMPSHIRE, AS LIQUIDATOR OF NOBLE TRUST COMPANY

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CERTIFICATE OF SERVICE

I, Bruce A. Harwood, do hereby certify that on December 17, 2008, I caused a true copy of the foregoing to be served electronically and via first class mail, postage prepaid, upon the parties listed below via first class mail, postage prepaid.

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